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Supreme Court, U.S.
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No. 04-699

In the Supreme Court of the United States

EDWARD and PAMELA REISER and
JANET GREENLEE,

Petitioners,

v.

RESIDENTIAL FUNDING CORPORATION
a/k/a GMAC-RFC,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT RESIDENTIAL FUNDING CORPORATION IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a federal court of appeals in properly resolving a state law statutory construction issue may, in the absence of a controlling decision from a state supreme court construing a statute, refuse to be bound by one intermediate state court's construction of that statute.

LIST OF PARTIES AND RULE 29.6 STATEMENT

All parties are listed in the caption. The parent companies of Respondent Residential Funding Corporation ("RFC") are: GMAC-RFC Holding Corporation; GMAC Mortgage Group, Inc.; General Motors Acceptance Corporation; and General Motors Corporation. General Motors Corporation is the only publicly-held company that owns 10% or more of RFC's stock.

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COUNTERSTATEMENT OF THE OPINIONS BELOW

The advance sheet attached to the Petition For Writ of Certiorari (the "Petition") as Exhibit A is not a true copy of the opinion of the court of appeals. By order dated August 19, 2004 (Exhibit A hereto), the court of appeals corrected the first line on page three of that advance sheet. The court of appeals' opinion is accurately reported at 380 F.3d 1027.

COUNTERSTATEMENT OF THE CASE

I. THE COURT OF APPEALS' DECISION IS UNREMARKABLE AND PROVIDES NO BASIS FOR THIS COURT'S REVIEW.

This case presents no compelling issues that merit this Court's review. The court of appeals, correctly recognizing that the Supreme Court of Illinois has not addressed the question of state law raised by Respondent's interlocutory appeal, properly discharged its responsibility to ascertain Illinois law by using all available data to predict how the Supreme Court of Illinois would decide the issue. The court of appeals' approach to ascertaining state law is not novel. It is wholly consistent with the approach taken by this Court and other federal courts of appeals, and it in no way violates principles of federalism.

II. COUNTERSTATEMENT OF FACTS MATERIAL TO THE PETITION

A. The District Court Refuses To Follow Controlling Seventh Circuit Precedent

Petitioners obtained high-interest second mortgage loans from Mortgage Capital Resources Corporation

("Mortgage Capital"). They contend that Mortgage Capital violated the Truth-in-Lending Act,[1] the Real Estate Settlement Practices Act,[2] and the Illinois Interest Act[3] by charging them excessive closing fees and engaging in prohibited fee-splitting. Petitioners did not name Mortgage Capital as a defendant. Instead, they seek relief only from Respondent Residential Funding Corporation ("RFC"). RFC had purchased Petitioners' notes (as part of larger mortgage pools) in the secondary market, and Petitioners seek to hold RFC liable (as the assignee of their loans) under a provision of the Home Ownership and Equity Protection Act, 15 U.S.C. § 1641(d)(1).

In the count of their complaint that is relevant to the Petition, Petitioners allege that they were charged closing costs and other charges that exceeded 3% of the principal value of their loans, in violation of § 4.1a(f) of the Illinois Interest Act. That provision provides, in relevant part:

> Where there is a charge in addition to the stated rate of interest payable directly or indirectly by the borrower and imposed directly or indirectly by the lender as a consideration for the loan, . . . whether denominated "points," "service charge," "discount," "commission," or otherwise, ... the rate of interest shall be calculated in the following manner:

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1 15 U.S.C. § 1601, *et seq.*

2 12 U.S.C. § 2601, *et seq.*

3 815 ILCS 205/4.1a(f).

> The percentage of the principal amount of the loan represented by all of such charges shall first be computed, which in the case of a loan with an interest rate in excess of 8% per annum secured by residential real estate . . . shall not exceed 3% of such principal amount.[4]

Section 4.1a(f) thus limited the aggregate non-interest charges associated with certain residential mortgage loans to 3% of the principal amount of the loan.

RFC moved to dismiss Petitioners' claim under the Illinois Interest Act pursuant to Federal Rule of Civil Procedure 12(b)(6). In its motion, RFC advised the district court that the U.S. Court of Appeals for the Seventh Circuit had held that § 4.1a(f) of the Illinois Interest Act had been impliedly repealed when the Illinois General Assembly amended other portions of the Act in 1981.

Through those comprehensive amendments, the Illinois General Assembly sought to increase the availability of funds for home financing that had been restricted by the Interest Act's limits on interest rates and fees associated with real estate loans. *Currie v. Diamond Mortgage Corp.*, 859 F.2d 1538, 1543 (7th Cir. 1988) (citing Transcript of Ill. Senate Debates, 82d Gen. Assembly June 23, 1981)). One of the 1981 amendments, the new § 4(1)(*l*), expressly provides:

> It is *lawful* to charge, contract for, and receive *any rate or amount of interest or compensation* with respect to the following transactions: . . .

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4 815 ILCS 250/4.1a(f). This provision was last amended in 1978.

> (f) loans secured by a mortgage on real estate.

815 ILCS 205/4(1)(*l*) (as amended) (emphasis added).

The General Assembly thereby made the policy decision that it was better for credit to be available at rates higher than the statutorily-imposed rates then in effect than for credit not to be available at all. Illinois Office of Banks and Real Estate, Interp. Letter No. 98-01 (Jan. 16, 1998) (Exhibit B hereto). *See* n. 13, *infra*.

The court of appeals recognized in *Currie* that if the old § 4.1a(f) were allowed to stand alongside the amended § 4(1)(*l*), the result would be incongruous. The Act simultaneously would *limit* the amount of points lenders are permitted to charge on certain residential mortgage loans but would specifically *permit* lenders to charge *any amount* of interest and *any amount* of compensation for such loans. *Currie*, 859 F.2d at 1543. The court of appeals has never reversed *Currie* or called it into question. To the contrary, the court of appeals referred to *Currie* with approval in a decision issued ten years later. *Jackson v. Resolution GGF Oy*, 136 F.3d 1130, 1131 (7th Cir. 1998).

The district court nonetheless elected not to follow the controlling precedent from the court of appeals, and denied RFC's motion to dismiss. The district court opted instead to follow two decisions by one of Illinois' five intermediate appellate courts (the Court of Appeals for the First District), which held that § 4.1a(f) of the Illinois Interest Act is still good law.[5]

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5 *U.S. Bank, Nat'l Ass'n v. Clark*, 348 Ill. App.3d 856, 807 N.E.2d 1109 (1st Dist. 2004), *appeal allowed*, __ N.E.2d __ (Ill. Nov. 24, 2004) ("*Clark*"); *Fidelity Financial Services, Inc. v. Hicks*, 214 Ill. App.3d 398, 574 N.E.2d 15

Continued on following page

B. The Court Of Appeals Accepts Interlocutory Review And Reverses

Recognizing that other district judges (including one in its own district) were *following* the Seventh Circuit's holding in *Currie*,[6] the district court granted RFC's petition to certify its order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The court of appeals accepted the interlocutory appeal, ratified its previous holding in *Currie*, and directed the district court to dismiss Petitioners' claim under § 4.1a(f) of the Illinois Interest Act.

The court of appeals did not (as Petitioners contend) ignore the cases the Illinois Court of Appeals for the First District decided after *Currie (Hicks* and *Clark)*. Rather, the court of appeals expressly considered and discussed those opinions, but concluded that neither of them demonstrated that the court of appeals' original prediction (in *Currie)* of how the Supreme Court of Illinois would decide the issue was wrong. *Reiser*, 380 F.3d at 1029-30.

After the court of appeals denied Petitioners' untimely motion for rehearing *en banc,* Petitioners invoked this Court's *certiorari* jurisdiction.

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(1st Dist. 1991), *appeal denied*, 141 Ill.2d 539, 580 N.E.2d 112 ("*Hicks*").

6 *Spann v. Community Bank*, No. 03 C 7022, 2004 WL 691785 *10 (N.D. Ill. Mar. 30, 2004); *Krone v. 125 Home Loan Owner Trust,* No. 01-cv-0691-MJR at 10 (S.D. Ill. Aug. 27, 2003) (unpublished) (Exhibit C hereto).

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' APPROACH TO PREDICTING STATE LAW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

The court of appeals' methodology for predicting state law in the absence of controlling authority from the state's highest court does not conflict with any decision of this Court. This Court does not (as the Petition contends) require the inferior federal courts to adhere blindly to the decisions of an intermediate state appellate court. Rather, this Court regularly recognizes that the federal courts have an independent obligation to predict, by reference to *all* appropriate information, how the state's highest court would decide the issue. The court of appeals did just that.

Petitioners' reliance on cases this Court decided over a two-week period in 1940 is misplaced.[7] Petitioners overstate the holdings of those cases and ignore the developments and refinements in this Court's *Erie* jurisprudence over the intervening six decades.[8]

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7 *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 183 (1940); *Six Companies of California v. Joint Highway Dist. No. 13 of State of California*, 311 U.S. 180, 188, 61 S. Ct. 186, 188 (1940); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 178-79, 61 S. Ct. 176, 178 (1940); and *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467, 61 S. Ct. 336, 339 (1940).

8 *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

A. Petitioners Overstate The Holdings In The *West* Line Of Cases.

In *West*, this Court criticized the court of appeals for rejecting a decision of an intermediate state appellate court in favor of what the federal court independently considered to be "the better rule." *West*, 311 U.S. at 235, 61 S. Ct. at 183. This Court held that federal courts were not "free to choose their own rules of decision" just because "the highest court of the state has not spoken." *Id.*, 311 U.S. at 236, 61 S. Ct. at 183. Rather, a federal court sitting in diversity is required to "ascertain from *all the available data* what the state law is and apply it . . . ." *Id.* The Court expressly recognized in this regard that a ruling by an intermediate appellate state court is but "a datum" in the *Erie* analysis. *Id.* Also central to this Court's criticism of the court of appeals' approach in *West* was the fact that the state court decision it ignored was rendered in a dispute between the very same parties. *Id.*, 311 U.S. at 238, 61 S. Ct. at 184.

In *Field* (decided the same day as *West*), this Court criticized the court of appeals for disregarding several decisions of the New Jersey Court of Chancery that addressed the constitutionality of a New Jersey statute. *Field*, 311 U.S. 169, 61 S. Ct. 176. Other than those opinions, there was "no other evidence" of how the Supreme Court of New Jersey might rule on that issue. *Id.*, 311 U.S. at 178, 61 S. Ct. at 178. In those limited circumstances, this Court concluded that it was improper for the court of appeals to analyze the question independently and without any regard for the trial court's interpretation of New Jersey law. *Id.*

Similarly, in *Six Companies of California* (also decided the same day) there was "no convincing evidence" of what the law of the state was other than the opinion of the intermediate court of appeals that the federal court of appeals

had disregarded. *Six Companies of California*, 311 U.S. at 188, 61 S. Ct. at 188.

Stoner, like *West*, involved the court of appeals' refusal to credit the decisions of a state court on "the precise question in issue" "between the same parties" to the federal litigation. *Stoner*, 311 U.S. 464, 467, 61 S. Ct. 336, 338. In short, the holdings of all four of these cases are far more circumscribed than the Petition admits.

B. This Court Has Re-Affirmed That The Federal Courts Are Not Bound By Decisions of Inferior State Courts.

Since the 1940's, this Court consistently has backed away from any notion that federal judges are to reflexively consider themselves bound by the rulings of any state court other than the state's highest authority. This change in emphasis from dicta in the *West* line of cases began as early as 1948. *King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 68 S. Ct. 488 (1948).

In *King*, this Court affirmed a court of appeals' decision not to follow a decision of a state trial court that was directly on point. Rather, this Court held that the court of appeals was correct in "proceed[ing] to make its own determination" of how the Supreme Court of South Carolina probably would rule on the question of South Carolina law. *King*, 333 U.S. at 161, 68 S. Ct. at 492. Central to this Court's reasoning in *King* was the premise that it would be "incongruous" to adopt a rule that bound the federal courts to a state court decision to an extent greater than that decision bound other state courts. *Id.*

In 1967, this Court confirmed that the *West* line of cases (like *King*) stood only for the proposition that a decision of an inferior state court is but a "datum" to which a federal court must give "proper regard." *Commissioner of*

Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782 (1967) ("under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling"). Such decisions, including the decisions of intermediate state courts of appeal, are not definitive pronouncements of state law that bind the federal courts. *Estate of Bosch*, 387 U.S. at 465, 87 S. Ct. at 1782.

The court of appeals here complied in all respects with this Court's *Erie* jurisprudence, as expressed in the *West* series of cases, *King*, and *Estate of Bosch*.

C. The Court Of Appeals Considered The Current State of The Law.

Petitioners also contend that the court of appeals failed to take Illinois law as it found it when this case came before the court. Petition at 14, citing *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S. Ct. 347, 350 (1941).

Although Petitioners' argument accurately states the holding of *Vandenbark*, it begs the ultimate question: whether Illinois law *had in fact changed* since the court of appeals decided *Currie*. Because the Supreme Court of Illinois had not addressed the continued viability of § 4.1a(f) of the Illinois Interest Act in the sixteen years since the court of appeals had decided *Currie*, the court of appeals properly declined to revisit that question here as if it were deciding it for the first time.

Moreover, the court of appeals properly recognized that developments at the state level since 1988 actually lent support to its reading of the Illinois Interest Act in *Currie*. *Reiser*, 380 F.3d at 1029 ("[b]oth the Attorney General of Illinois and the agency that regulates banking under Illinois law have issued advisory opinions consistent with *Currie*"). In February 1989, for example, the Legal Counsel of the

Illinois Department of Financial Institutions issued an opinion letter in which it expressly adopted both the reasoning behind and the holding in *Currie*.[9] The Department of Financial Institutions expressly held in that opinion that the 1981 amendments to § 4(1)(*l*) "are so clearly inconsistent with the points limitation in Section 4.1a of the Statute that such limitation is necessarily repealed." *See also Jackson v. Resolution GGF Oy*, 136 F.3d 1130, 1134 (7th Cir. 1998) (describing the author of this opinion letter as the "top lawyer at the state agency" that regulates financial institutions, and holding that a mortgage lender's reliance on that letter insulated it from liability under the Interest Act's "safe harbor").

In 1996, the Attorney General of Illinois also cited with approval (in a letter to the Director of the Department of Financial Institutions) the alternative holding in *Currie* – that § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA")[10] preempted all of § 4.1a of the Illinois Interest Act.[11] Indeed, in that opinion letter, the Attorney General mentioned, but attributed little to no importance to, the contrary suggestion made in *Hicks*.[12]

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9 Ill. Dept. of Fin. Inst., Opinion Letter (Feb. 28, 1989) (Exhibit D hereto). The Department of Financial Institutions is now a division in Illinois' Department of Financial and Professional Regulation.

10 12 U.S.C. § 1735f-7.

11 Ill. Atty. Gen. Op. 96-037 (Dec. 3, 1996) (Exhibit E hereto). *See Currie*, 859 F.2d at 1542.

12 Ill. Atty. Gen. Op. 96-037. Opinion 96-037 is still posted on the official government website

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In 1998, the Illinois Office of Banks and Real Estate ("OBRE") issued an opinion that also expressly endorsed *Currie's* holding that § 4.1a(f) of the Illinois Interest Act had been impliedly repealed.[13] The OBRE in fact built on the reasoning of *Currie* to conclude that, just as the limitation on fees set forth in § 4.1a(f) had been impliedly repealed in 1981, so, too, had the limitation on interest rates set forth in § 4a(a)(i).[14] The OBRE's opinion letter was distributed to mortgage lenders throughout Illinois, and still appears –

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(www.ag.state.il.us/opinions/1996/96-037.html). Although the Attorney General recently has reversed its position on the preemptive effect of § 501 of the DIDMCA, the Attorney General has not expressed any disapproval of the court of appeals' conclusion in *Currie* that § 4.1a(f) of the Illinois Interest Act had been impliedly repealed.

13 Ill. Office of Banks and Real Estate, Interp. Letter No. 98-01 (Jan. 16, 1998) (Exhibit B hereto). The OBRE is now a division in the Illinois Department of Financial and Professional Regulation. *See* 20 ILCS 3205/0.4. The Division of Banks and Real Estate "oversees the regulation and licensure of State chartered banks, trust companies, ATMs not owned by financial institutions, check printers, pawnbrokers, savings banks and savings and loan associations, mortgage bankers and brokers, real estate brokers and salespersons, appraisers, auctioneers, home inspectors, leasing agents, and time share companies." *See* OBRE website (www.obre.state.il.us). *See also* 20 ILCS 3205/5, 3205/6 (describing the powers and duties of the OBRE).

14 OBRE, Interp. Letter No. 98-01 (interpreting 815 ILCS 205/4a(a)(i)).

without qualification or limitation – on the official government website.[15]

Although these opinion letters do not have the force of law in Illinois, the state courts of Illinois nonetheless give such opinions of state regulators considerable respect. *Mattis v. State Universities Retirement System*, 212 Ill.2d 58, 816 N.E.2d 303, 313 (2004) ("we accord deference to the interpretation of a statute by the agency charged with its administration"); *Shields v. Judges' Retirement System of Illinois*, 204 Ill.2d 488, 492, 791 N.E.2d 516 (2003). *Accord Rockwood Holding Co. v. Dep't of Revenue*, 312 Ill. App.3d 1120, 1123, 728 N.E.2d 519 (2000) (courts "defer to an administrative agency's interpretations and enforcement of statutes because of the considerable experience and expertise it may have concerning the issues before it"); *West Belmont L.L.C. v. City of Chicago*, 349 Ill. App.3d 46, 49, 811 N.E.2d 220, 224 (2004) ("we accord substantial weight and deference to an agency's interpretation because agencies are an informed source for ascertaining the legislature's intent").

The court of appeals therefore acted properly in recognizing that these interpretations, too, are "data" that should influence any prediction as to how the Supreme Court of Illinois might rule when it faces the issue.

District courts within the Seventh Circuit also have concluded, based on *their* independent review of the Interest Act, that *Currie* was correct in its prediction that the Supreme Court of Illinois would find the plain language of old § 4.1a(f) to be irreconcilable with the language and purpose of the 1981 amendments. *Krone v. 125 Home Loan Owner Trust*, No. 01-CVC-0691-MJR, slip op. at 10 (S.D.

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15 www.obre.state.il.us/cbt/legal/intrltr/btil9801.pdf.

Ill. Aug. 27, 2003) (Exhibit C hereto); *Spann v. Community Bank of North Virginia*, 2004 WL 691785, *10 (N.D. Ill. Mar. 30, 2004) (referencing the "clear inconsistencies between the plain language of the 1981 amendments to Section 4 of the General Interest Statute and the language of Section 4.1a of the Act" as a reason to follow *Currie*).

The court of appeals considered *all* of these intervening developments (including the decisions in *Hicks* and *Clark*). In view of the conflict between the decisions of one intermediate appellate court and the Illinois regulators, the court of appeals prudently deemed it "best to stick with one assessment until after the state supreme court, which alone can end the guessing game, does so." *Reiser*, 380 F.3d at 1029.

II. THE COURT OF APPEALS' APPROACH IS CONSISTENT WITH THE APPROACH TAKEN BY OTHER FEDERAL COURTS OF APPEALS.

Petitioners' contention that the court of appeals created a conflict among the federal courts of appeals also is unfounded.[16] The federal courts of appeals regularly decline to follow the decisions of an intermediate state appellate court if they conclude, based on all relevant data, that the state's highest court would apply a different legal standard.[17] The approach the court of appeals took here was no different.

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16 Petition at 15.

17 *See, e.g., Ground Air Transfer, Inc. v. Westates Airlines, Inc.*, 899 F.2d 1269 (1st Cir. 1990); *Competex, S.A. v. LaBow*, 783 F.2d 333, 351 n.16 (2d Cir. 1986); *Fisher v. USAA Casualty Ins.* Co., 973 F.2d 1103 (3d Cir. 1992); *Adams v. Star Enterprise*, 51 F.3d 417 (4th Cir. 1995); *Industrial Indem. Co. v. Chapman & Cutler*, 22 F.3d 1346

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Petitioners' alternate contention – that the court of appeals announced "new standards" that put district courts in a "dilemma" – also is unfounded.[18] The court of appeals' approach – to consider but not consider itself bound by – the decisions of the intermediate state court of appeals is well-established within the Seventh Circuit.[19]

Moreover, far from putting the district courts in a "dilemma," the court of appeals' insistence that the district courts respect the court of appeals' prediction of state law until and unless the state's highest authority speaks to the question actually *relieves* the district courts of an obligation to re-evaluate state law each and every time an intermediate state appellate court (or a state trial court) issues an opinion. This respect for the judicial hierarchy (that Petitioners decry

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(5th Cir. 1994); *FL Aerospace v. Aetna Cas. & Sur. Co.*, 897 F.2d 214 (6th Cir. 1990), *cert. denied*, 498 U.S. 911, 111 S. Ct. 284; *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486 (8th Cir. 2001), *cert. denied*, 534 U.S. 887, 122 S. Ct. 198; *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429 (9th Cir. 1994), *cert. denied*, 517 U.S. 1219, 116 S. Ct. 1847 (1996); *Stuart v. Colorado Interstate Gas Co.*, 271 F.3d 1221 (10th Cir. 2001); *Sales v. State Farm Fire & Cas. Co.*, 849 F.2d 1383 (11th Cir. 1988).

18 Petition at (i), 16.

19 *See, e.g., McGeshick v. Choucair*, 9 F.3d 1229, 1232 (7th Cir. 1993), *cert. denied*, 517 U.S. 1212, 116 S. Ct. 1834 (1996); *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 814 (7th Cir. 1992) (Posner, J.), *cert denied*, 507 U.S. 1005, 113 S. Ct. 1646 (1993).

as "unconstitutional") is an integral feature of the federal court system.[20]

III. THE COURT OF APPEALS' APPROACH RESPECTS PRINCIPLES OF FEDERALISM AND DISCOURAGES FORUM SHOPPING.

The court of appeals also did not (as Petitioners contend) violate "fundamental principles of federalism" when it declined to follow two decisions of a single intermediate state court on a matter of state law. In a judicial system wherein both federal courts and state courts have the power and the duty to interpret and apply state law, differences of opinion like those that have manifested themselves here are neither uncommon nor unexpected. *See* n. 17, *supra* (all examples of situations where a federal court of appeals' prediction of state law differed from the rulings of one or more intermediate state courts).

Neither the court of appeals' approach to ascertaining Illinois law nor its ultimate interpretation of Illinois law encourages litigants to "forum shop" between the state and federal courts in Illinois. Central to the *Erie* doctrine is the principle that questions of state law should be decided in federal court on the same terms as if they had been decided in the state court system, through and including the state's highest judicial authority.

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20 *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 284 (1977) (court of appeals was correct to follow a "wobbly" precedent of this Court, "for it is this Court's prerogative alone to reverse one of its precedents"). *Accord Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989).

Giving the decisions of an inferior state court more of a binding effect than they would have in the state court system itself "would undermine the ability of the federal courts to ensure that the outcome of the litigation be substantially the same as it would be if tried in a state court and subjected to that system's appellate process." C. Wright & A. Miller, 19 Fed. Prac. & Proc. Juris.2d § 4507 (2004). By requiring federal courts to make their best efforts to predict, based on all pertinent data, how the highest court of the state would rule on the issue (instead of relying on potentially conflicting and changing decisions by one or more inferior courts), parity between the state and federal courts is encouraged and preserved. *See, e.g., King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 159, 68 S. Ct. 488, 492 (1948) (requiring adherence to the decisions of an inferior state court may well *not* provide "uniformity in the application of" state law, given the potential for conflicting decisions among the inferior state courts and the potential for reversal or modification by the state's highest court).

IV. THE COURT OF APPEALS' CONSTRUCTION OF THE ILLINOIS INTEREST ACT IS NOT DEMONSTRABLY WRONG, AND IF IT WERE, THE SUPREME COURT OF ILLINOIS IS IN THE BEST POSITION TO ADDRESS IT.

The court of appeal's determination that § 4.1a(f) of the Illinois Interest Act was impliedly repealed in 1981 is not demonstrably wrong or otherwise deserving of this Court's review. The court of appeals properly recognized in *Currie* that the entire "deregulatory impetus" of the 1981 amendments to Illinois' interest statutes was inconsistent with the limitation on fees associated with real estate loans set forth in § 4.1a(f). *Currie*, 859 F.2d at 1543. Illinois' regulators' *agreement* with *Currie* dispels any argument that this case warrants this Court's intervention.

In any event, the Petition also should be denied for the independently compelling reason that the court of appeals' decision does not have the far-ranging reach Petitioners ascribe to it. If the decision were in error, the Supreme Court of Illinois is best-positioned to address it. The Supreme Court of Illinois recently accepted a discretionary appeal in *U.S. Bank Nat'l Ass'n v. Clark*.[21] One of the bases on which the lenders in *Clark* sought and obtained discretionary review was their request that the Court resolve the split of authority between *Hicks* and *Clark* on the one hand and *Currie* (and this case) on the other.[22]

As the court of appeals correctly observed, the Supreme Court of Illinois is the only court in a position to end the "guessing game" over the continued viability of § 4.1a(f) of the Illinois Interest Act. Now that it has agreed to do so, there is no compelling reason why this Court should exercise its certiorari jurisdiction to hear this case.

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21 *U.S. Bank Nat'l Ass'n v. Clark*, 348 Ill. App.3d 856, 807 N.E.2d 1109 (1st Dist. Mar. 31, 2004), *appeal allowed*, __ N.E.2d __ (Ill. Nov. 24, 2004).

22 *See* Joint Petition For Leave To Appeal Or, In The Alternative, For Appeal As A Matter Of Right in *Clark* at pp. 18-19.

CONCLUSION

The court of appeals' decision is in accord with the caselaw of this Court, is consistent with approaches taken by other federal courts of appeals, and does not conflict with any decision of the Supreme Court of Illinois. Because Petitioners have not identified any other compelling reason why this Court should exercise its certiorari jurisdiction to hear this case, the Petition should be denied.

DATED: December 27, 2004

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 19, 2004

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

EDWARD and PAMELA REISER, and JANET GREENLEE, *Plaintiffs-Appellees,*	) Appeal from the) United States) District Court for the
No. 04-8017 v.	) Southern District) of Illinois.
RESIDENTIAL FUNDING CORPORATION, *Defendant-Appellant.*	) No. 03-CV-0619-DRH) David R. Herndon,) *Judge.*

Order

The opinion of the court issued today is amended as follows:

Page 3, first line, change "two decisions by the state's five intermediate appellate" to "two decisions by one of the state's five intermediate appellate".

Interpretive Letter No. 98-01 (January 16, 1998)

Loans secured by a real estate mortgage are governed by Section 4(1)(1), and not Section 4a(a)(i), of the Interest Act.

This letter responds to your inquiry regarding the Illinois Interest Act ("Act") [815 ILCS 205/0.01 et seq.], and in particular whether loans that are secured by a real estate mortgage are governed by Section 4(1)(1) [815 ILCS 205/4(1)(1)] or Section 4a(a)(i) [815 ILCS 205/4a(a)(i)] of the Act. For the reasons set forth in this letter, we conclude that Section 4(1)(1) is the controlling section and therefore, any rate of interest may be charged for loans secured by a mortgage on real estate.

Section 4(1) of the Act, which governs written contracts for "money loaned or in any manner due and owing," generally provides for a 9% interest rate limitation. However, over time, the General Assembly has added numerous exemptions to that limit resulting in 14 types of loan transactions for which it is lawful to charge, contract for, and receive any rate or amount of interest or compensation. The earliest exemptions were obviously business or commercial in nature causing one court to conclude that, "The statute is quite apparently designed to protect only relatively small, personal, non-business borrowers from high interest rates." Koos v. First National Bank of Peoria, 496 F.2d 1162, 1164 (1974).

In 1982, the Illinois General Assembly amended Section 4(1)(1) of the Act to state, "It is lawful to charge, contract for, and receive any rate or amount of interest or compensation with respect to...loans secured by a mortgage on real estate." The legislative intent of 4(1)(1) was "to increase the availability of funds for home financing previously restricted by the statute's limit on interest rates and fees associated with real estate loans." Currie v. Diamond Mortgage Corporation, 859 F.2d 1538, 1543 (1988). To paraphrase Currie, the General Assembly concluded that available credit at higher than statutorily imposed rates is better than having no credit.

Federal law is useful in partially resolving the conflict between Sections 4(1)(1) and 4a(a)(i). Section 501 of the federal

Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) invalidates state laws which expressly limit the rate or amount of interest on loans secured by a first lien on residential real property. 12 U.S.C. §1735f-7a. The Illinois Attorney General has concluded that DIDMCA has partially preempted 4.1a of the Act [815 ILCS 205/4.Ia] which limits, to 3% of principal, the amount of charges a lender may charge on loans secured by residential real estate with an interest rate over 8%. Illinois Attorney General Opinion #96-037 (12-3-96). Similarly, DIDMCA would preempt Section 4a(a)(i) to the extent it applies to loans secured by a first lien on residential property.

Regarding loans not preempted by DIDMCA, the discussion in Currie is instructive. In Currie, the court was asked to reconcile Section 4(1)(l) with Section 4.1a. Discussing U.S. v. Will [449 U.S. 200 (1980)], the court said that although repeal by implication is strongly disfavored by the courts, it will be invoked if "a statute enacted later in time is repugnant to an earlier statute such that the two acts cannot stand together." Currie, 1542. Using this analysis, the court ruled that the "deregulatory impetus" of Section 4(1)(l) is inconsistent with the limitation on fees contained in Section 4.1a and that Section 4.1a was therefore implicitly repealed. Id., 1543. Similarly, we believe that this legislative intent of Section 4(1)(l) is equally inconsistent with the interest rate limitations of Section 4a(a)(i), that the two provisions cannot stand together, and that Section 4(1)(l) should apply to installment loans secured by real estate.

Finally, as you stated in your letter, if the Section 4a interest restriction were applied to real estate loans despite the permissive language of Section 4(1)(l), it would be equally applicable to the other types of loans exempted in Section 4(1). Applying the 9% limit to loans such as corporate loans and business loans would be contrary to long standing interpretations that these "exempt" loans are limited only by the terms negotiated between the lender and the borrower, and not governed by Section 4a.

Thus, based on the legislative intent of Section 4(1)(l), federal preemption by DIDMCA, the analogous holding of Currie, and

the unexpected and unintended results that would otherwise result for other "exempt" loans, we conclude that loans secured by real estate are governed by Section 4(1)(l), and not Section 4a(a)(i) of the Act.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MICKEY KRONE and LINDA KRONE,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No.
	)	01-cv-0691-MJR
125 HOME LOAN OWNER TRUST,	)	
	)	
Defendant.	)	

MEMORANDUM and ORDER

REAGAN, District Judge:

I. Introduction

Two of numerous named Defendants removed this case from the Circuit Court of Madison County, Illinois in October 2001. The Court determined that it could exercise subject matter jurisdiction under 28 U.S.C. § 1332, as all parties were completely diverse, and the amount in controversy exceeded $75,000.[1]

In March 2002, Plaintiffs filed an amended class action complaint herein. (Doc. 90). Via that complaint plus a series of Orders entered by the Court, this action has been reduced to the claims of two Plaintiffs, Mickey and Linda Krone, against one Defendant, 125 Home Loan Owner Trust ("HLOT-125"). In a June 2003 Order, the Court clarified that these were the only remaining parties (*see* Doc. 203).

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1 Plaintiff Mickey Krone sought $138,970 in damages.

The discovery deadline now has passed, and trial is scheduled for December 2, 2003. If the Krones seek to proceed as a class, they must move for class certification by September 2, 2003. HLOT-125 has twenty days from the *filing* of that motion to file a brief opposing certification.

In the meantime, one pending motion requires resolution – HLOT-125's June 3, 2003 motion to dismiss with prejudice the amended complaint. The Krones obtained two extensions of time (through July 14, 2003) to file their memorandum opposing dismissal. HLOT-125 filed its reply brief on July 28, 2003. The motion now is fully briefed.

It may well be that HLOT-125's motion was not timely filed.[2] But the Court has permitted briefing on this motion and recognizes that confusion exists in the record as to the dispositive motion deadline. Moreover, the Krones never challenged the June 3, 2003 dismissal motion as belatedly filed. For these reasons, the Court turns to the merits of the pending motion, beginning with reference to the legal standards governing review.

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2 The original dispositive motion deadline was extended several times. Magistrate Judge Clifford J. Proud's November 21, 2002 Order amended the Scheduling and Discovery Order to permit dispositive notions to be filed through January 31, 2003 (see Doc. 162). The undersigned District Judge extended at least one Defendant's dispositive motion deadline to February 4, 2003 (see Doc. 170). The docketing sheet and Court file reveal no further extension of the dispositive motion deadline. When the parties successfully obtained an extension of the Scheduling and Discovery Order in June 2003, they did not include a revised dispositive motion deadline (see Doc. 201 and attachments). Judge Proud's Order adopting their proposed schedule did not set a new dispositive motion deadline either. Thus, it is possible that dispositive motions were due by January 31, 2003 or February 4, 2003.

II. Applicable Legal Standard

HLOT-125 seeks dismissal under FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) and FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1).

Dismissal motions filed under Rule 12(b)(6) attack the sufficiency of the plaintiff's claims, whereas dismissal motions filed under Rule 12(b)(1) challenge the subject matter jurisdiction of the Court (including, as here, a party's standing to bring suit).

When reviewing a complaint in the context of a dismissal motion filed under Rule 12(b)(6), the Court accepts as true all well-pled factual allegations and resolves in the plaintiff's favor all reasonable inferences. ***Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623, 625 (7th Cir. 2001), *citing Transit Express, Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001).**

Dismissal for failure to state a claim is proper only if the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. ***Alper v. Altheimer & Gray*, 257 F.3d 680, 684 (7th Cir. 2001), *citing Conley v. Gibson*, 355 U.S.41, 45-46 (1957), and *Veazey v Communications & Cable of Chicago, Inc.*, 194 F.3d 850, 854 (7th Cir. 1999).** If it is possible to hypothesize a set of facts, consistent with the complaint, that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate. ***Alper* at *684, quoting Veazey*, 194 F.3d at 854.**

Similarly, when reviewing a dismissal motion under Rule 12(b)(1), "a court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff." ***Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 701 (7th Cir. 2003), citing Long v. Shorebank Dev. Corp., 182 F.3d 548, 554 (7th Cir. 1999).**

There are circumstances, however, in which a Court assessing a Rule 12(b)(1) motion "may look beyond the

jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists: ***Id.***[3]

The United States Court of Appeals for the Seventh Circuit has explained:

> If subject matter jurisdiction is not evident on the face of the complaint, the motion to dismiss pursuant to Rule 12(b)(1) would be analyzed as any other motion to dismiss, by assuming for purposes of the motion that the allegations in the complaint are true. However,...if the complaint is formally sufficient but the contention is that there is *in fact* no subject matter jurisdiction, the movant may use affidavits and other material to support the motion. The burden of proof on a 12(b)(1) issue is on the party asserting jurisdiction.... And the court is free to weigh the evidence to determine whether jurisdiction has been established.

***United Phosphorus, Ltd v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir. 2003).**

In the case at bar, however, the only Rule 12(b)(1) dismissal arguments were directed to two parties no longer in the case – Plaintiffs Woodrow and Louise Moad. Because they already have been dismissed from this action (*see* June 13, 2003 Order), the Court need not reach the Rule 12(b)(1) dismissal argument presented by HLOT-125. Thus, the Court focuses on the arguments for dismissal under Rule 12(b)(6).

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3 By contrast, a Court considering a Rule 12(b)(6) motion may <u>not</u> consider materials "outside the pleadings."

III. Analysis

The Krones are Illinois homeowners who obtained second mortgage loans from First National Mortgage Exchange ("1st National"). The Krones allege that 1st National charged deceptive and illegal fees in connection with this loan. Specifically, the Krones claim that 1st National charged costs and fees that violated the Illinois Interest Act, **815 ILCS 205/4.1a, *et seq.***

The Krones' loan later was purchased by HLOT-125. The Krones contend that HLOT-125, as the holder of the 1st National loan, remains liable for 1st National's lending violations. The Krones offer two bases for this liability: (1) Illinois assignee liability law, and (2) the Federal Homeowners Equity Protection Act ("HOEPA"), **15 U.S.C. § 6001, *et seq.***

In pleadings subsequent to their, amended complaint, the Krones "withdrew" (*i.e.*, abandoned) all claims under the Illinois Consumer Fraud and Deceptive Business Practices Act. *See* Doc. 210, p. 2.[4] That leaves only the Krones' claims under the Illinois Interest Act.

More specifically, the Krones' cause of action against HLOT-125 is based on § 4.1a(f) of the Illinois Interest Act, which governs "charges for items paid or incurred in connection with loans." Section 4.1a(f) provides:

> Where there is a charge in addition to the stated rate of interest payable directly or indirectly by the borrower and imposed directly or indirectly by the lender as a consideration for the loan, ... whether

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4 The Krones also have "withdrawn" any claims that the Moad Plaintiffs have against HLOT-125 (Doc. 210, p. 2). But Woodrow and Louise Moad no longer are Plaintiffs herein. *See* Court's June 13, 2003 Order (Doc. 230, p. 1).

> denominated "points," "service charge," "discount," "commission," or otherwise, ... the rate of interest shall be calculated in, the following manner:
>
> The percentage of the principal amount of the loan represented by all of such charges shall first be computed, which in the case of a loan with an interest rate in excess of 8% per annum secured by residential real estate, other than loans described in paragraphs (e) and (f) of Section 4, shall not exceed 3% of such principal amount.

Stated simply, as to loans with an annual interest rate over 8%, § 4.1a(f) limits charges by the lender (such as "points" and "service charges") to 3% of the loan principal amount. ***Currie v. Diamond Mortgage Corp. of Illinois,* 859 F.2d 1538, 1541 (7th Cir. 1988).**

In 1981, the Illinois legislature enacted comprehensive amendments to the Illinois Interest Act. The amendments were intended to increase the availability of funds for home financing — funds previously restricted by the Illinois Interest Act's limits on interest rates and fees associated with real estate loans. ***Currie, 859 F.2d at 1543.***

One of the 1981 amendments to the Illinois Interest Act, provided (emphasis added) that it is "lawful to charge, contract for, and receive *any rate or amount of interest or compensation*" with respect to certain specified transactions, including "loans secured by a mortgage on real estate." This is § 4(1)(*l*) of the Illinois Interest Act, as amended.

In other words, § 4(1)(*l*) removed all limits on interest rates, points, and other consideration charged on residential real estate mortgages. ***Currie*, 859 F.2d at 1542**. Seven years after the 1981 amendments, the United States Court of Appeals for the Seventh Circuit concluded that the language of § 4.1a(f) was wholly irreconcilable with the newly enacted § 4(1)(*l*):

> The deregulatory impetus of the 1981 amendments is inconsistent with the limitation on fees associated with real estate loans contained in Section 4.1a....
>
> The language of the two provisions is also irreconcilable. If Section 4.1a is allowed to stand with the amended Section 4, Section 4.1a would impose a limit on the amount of points which lenders may charge on loans in excess of 8% per annum, while Section 4 enables lenders to charge *any* amount for such loans. Clearly, the failure to repeal Section 4.1a was an oversight of the legislators.

***Currie*, 859 F.2d at 1543.**

The Seventh Circuit held that the 1981 amendments implicitly repealed § 4.1a(f) of the Illinois Interest Act. The Seventh Circuit further held that, because § 4.1a(f) was no longer effective, the district court properly *dismissed* the borrowers' suit against a lender over a loan origination fee equivalent to 16% of the principal amount of a residential mortgage loan.

In the suit at bar, the Krones' claims against HLOT-125 are based squarely upon § 4.1a(f) of the Illinois Interest Act. The Krones maintain that § 4.1a(f) has *not* been repealed. To support this argument, the Krones rely on one opinion of an Illinois appellate court – ***Fidelity Financial Services, Inc. v. Hicks*, 574 N.E.2d 15 (Ill. App. 1991).**

In ***Fidelity***, the Appellate Court of Illinois, First District, concluded that § 4.1a(f) was not impliedly repealed by the 1981 amendments to the Illinois Interest Act. The Court then found that the borrowers had stated a cause of action against the lender for violations of the Illinois Interest Act based on a "prepaid finance charge" of toughly 13.5% of principal.

In so holding, the First District acknowledged both the contrary holding of the Seventh Circuit in ***Currie*** and the February 1989 Opinion Letter of the Illinois Department of Financial Institutions adopting the ***Currie*** rationale. The

First District stressed that "neither the Seventh Circuit nor the Opinion Letters of state agencies bind state courts," and thus declared itself free to resolve the issue differently.

Clearly, this United States District Court is not free to simply ignore published opinions of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit spoke plainly in ***Currie***, holding that § 4.1a(f) of the Illinois Interest Act has been repealed. Additionally, as the Illinois Court of Appeals pointed out in ***Fidelity***, the Illinois Department of Financial Institutions adopted the holding of ***Currie***. The fact that a state regulatory agency, whose task it is to interpret Illinois laws relevant to financial transactions, has interpreted the provision in question here to be repealed, is telling.[5]

The parties agree that this Court, sitting in diversity, must apply the law of Illinois as would the highest court of that state. ***See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 633 (7th Cir. 2002)("the ultimate responsibility of the district courts is to apply the law of the state in which the court sits with respect to substantive matters")**. To satisfy the mandate of ***Erie***, this District Court, exercising its diversity jurisdiction, "must make a predictive judgment as to how the supreme court of the state would decide the matter if it were presented presently to that tribunal." ***Allstate*, 285 F.3d at 635.**

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5 In support of dismissal, HLOT-125 submits both the Opinion Letter referenced in *Fidelity* and a January 1998 "Interpretive Letter" of the Illinois Office of Banks and Real Estate. However, as defense counsel surely are aware, on a Rule 12(b)(6) dismissal motion, this Court may not consider materials "outside" the pleadings, such as the attachments to HLOT-125's dismissal memorandum. This Court has confined its review to the pleadings before it, plus relevant case law.

Unfortunately, the Illinois Supreme Court has not addressed whether the 1981 amendments impliedly repealed § 4.1a(f) of the Illinois Interest Act. One Illinois Court of Appeals did address this issue in ***Fidelity***. But where a state's highest court has not decided an issue, the opinions of an intermediate appellate court of that state do not constitute "binding evidence" of how the state's Supreme Court would rule on an issue. ***Green v. J. C. Penney Auto Ins. Co., Inc.*** **806 F.2d 759, 761 (7th Cir. 1986), *citing Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967)("Intermediate appellate court cases are useful but not binding evidence of what the Illinois Supreme Court would do in a similar case.").**

So the Court considers ***Currie***, in which the Seventh Circuit held that § 4.1a of the Illinois Interest Act had been repealed, and ***Fidelity***, in which an Illinois Court of Appeals held tha § 4.1a was alive and well. One additional case must be considered.

In ***Jackson v. Resolution GGF OY*****, 136 F.3d 1130 (7th Cir. 1998)**, the Seventh Circuit again confronted a suit brought by Illinois borrowers to recover statutory penalties against lenders and their assignees. The borrowers' theory was that the lenders and assignees had charged points on the loans which exceeded those permitted by the Illinois Interest Act.

One question on appeal was whether a mere purchaser of the notes *who did not hold any of the notes* merited dismissal. The Seventh Circuit answered that question affirmatively, finding that no case or controversy existed between such defendants and the borrowers/plaintiffs. ***Id.*****, 136 F.3d at 1132**. Another question on appeal focused on whether a Defendant foreign corporation from Finland enjoyed immunity from financial penalties under the Foreign Sovereign Immunities Act, **28 U.S.C. § 1606**. The Court answered that question negatively.

The primary issue, however, was whether Defendant Harbor Financial Group could avoid liability by relying on a

safe harbor provision under a prior version of § 6 of the Illinois Interest Act, 815 ILCS 205/6. That provision protected financial companies who, *in good faith*, relied on (and conformed their business activities to) a rule, a regulation, or interpretation issued by the Illinois Department of Financial Institutions.

Harbor had relied on the February 1989 letter of the Legal Counsel for the Illinois Department of Financial Institutions which delineated the Department's position adopting ***Currie's*** holding that § 4.1a(f) of the Illinois Interest Act had been repealed. The Court concluded that Harbor was shielded by the safe harbor provision of § 6 of the Act. ***Jackson*, 136 F.3d at 1133.**

In ***Jackson***, the Seventh Circuit did not explicitly overrule ***Currie***. Nor did the Court find that ***Fidelity*** had rendered ***Currie*** meaningless. Indeed, ***Currie*** still appears as "good" law if one cite checks the case on Westlaw©.[6]

Jackson did not flatly state whether § 4.1a(f) of the Illinois Interest Act had been repealed. The Court *did* mention in dicta that Defendant Harbor had been emboldened by ***Currie*** to charge more than 3 points on its Loans *until* the Illinois Court of Appeals handed down ***Fidelity***. Without commenting on whether it agreed with this conclusion, the Seventh Circuit described ***Fidelity*** as holding "that ***Currie*** misunderstood state law and that the points limitation remains force." ***Jackson*, 136 F.3d at 1131**. Careful review of ***Jackson*** reveals that it simply does not answer the question before this Court – whether § 4.1a(f) of the Illinois Interest Act can exist in the wake of the 1981 amendments.

This Court's task is to predict how the Illinois Supreme Court would resolve this issue. Having carefully

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6 The exercise reveals a notation that ***Jackson*** recognized "disagreement" with the holding of ***Currie***.

reviewed the relevant statutory provisions and all applicable caselaw, this Court concludes that the Illinois Supreme Court would find the plain language of § 4.1a(f) irreconcilable with the 1981 amendments (specifically, with § 4(l)(*l*)). Thus, as did the Seventh Circuit in ***Currie***, the Illinois Supreme Court would hold that a cause of action under § 4.1a(f) of the Illinois Interest Act no longer remains viable.

Because the Krones' case is premised entirely on § 4.1a(f) of the Illinois Interest Act, dismissal with prejudice is warranted.

HLOT-125 alternatively argues that Rule 12(b)(6) dismissal is required, because the Illinois Interest Act does not provide for vicarious liability. Stated another way, HLOT-125 contends that the Illinois Interest Act penalizes only the originator of a loan (here, 1st National), not a mere subsequent holder of the loan. The Court is not persuaded by this argument, although it need not reach the point at all, having already found dismissal merited on another ground.

It is true that § 4.1a(f) of the Act speaks in terms what a "lender" can charge or collect in connection with a loan. But § 6 of the Act, **815 ILCS 205/6**, imposes a penalty (twice the total of all interest, discount, and charges determined by the loan contract or paid by the obligor, whichever is greater, plus attorneys' fees and costs) against any "person or corporation" who *receives, directly or indirectly*, unlawful interest or charges in connection with a loan. This language sweeps broadly enough to encompass entities that take assignment of Illinois loans.[7]

Additionally, general principles of Illinois assignment law support the conclusion that HLOT-125 (as

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7 The Court does not reach the issue of whether federal law (i.e., HOEPA) enables the Krones to assert against HLOT-125 all claims and defenses they had against 1st National.

holder) stepped into the shoes of 1st National (the lender), thereby acquiring 1st National's interest, subject to all claims and defenses existing at the time of the assignment. ***See, e.g., John O. Schofield Inc. v. Nikkel*, 731 N.E.2d 915, 925 (Ill. App, 2000), *quoting Stavros v. Karkomi*, 349 N.E.2d 599 (Ill. 1976)(Illinois law is "well settled" that when a valid assignment is effected, the assignee acquires all of the interest of the assignor in the property that is transferred and "takes the assignor's interest subject to all legal and equitable defenses existing at the time of the assignment.").**

Dismissal is not warranted on the theory that HLOT-125 is not the original lender to the Krones. But dismissal is warranted on the ground that the Illinois legislature implicitly repealed the provision on which the Krones' cause of action rests - § 4.1a(f) of the Illinois Interest Act.

IV. Conclusion

Accordingly, the Court **GRANTS** HLOT-125's motion to dismiss (Doc. 199). Dismissal of this case shall be *with* prejudice.

IT IS SO ORDERED.

DATED this 27th day of August, 2003.

/s/ Michael J. Reagan

MICHAEL J. REAGAN

United States District Judge

STATE OF ILLINOIS
DEPARTMENT OF FINANCIAL INSTITUTIONS

State of Illinois Center
100 West Randolph * Suite 15-700
Chicago, Illinois 60601

James R. Thompson
Governor

Michael E. Fryzel
Director
Joanne Mitchell
Assistant Director

February 28, 1989

Mr. Harry E. Sandstrom
Assistant General Counsel
Norwest Financial, Inc.
208 Eight Street
Des Moines, Iowa 50309

RE: Points on Illinois Loans

Dear Mr. Sandstrom:

Your January 13, 1989 letter to the Department referred to the recently decided case of Currie v. Diamond Mortgage Corp. of Illinois, 839 F.2nd 1538, [*sic*] (7th Cir. 1988) and inquired whether the Department would criticize a Consumer Installment Loan Act licensee who charged "points" in excess of the limitation set forth in Section 4.1a of the General Interest Statute (Ill. Rev. Stat., 1987, Ch. 17, Par. 6406).

It is the Department's position that the Currie Court clearly held that the 1983 amendments to Section 4(1)(L) (Par. 6404(1)(L) of the Statute provide that it is lawful to charge any rate of interest or compensation on loans secured by a mortgage on real estate. This amendment is so clearly inconsistent with the points limitation in Section 4.1a of the Statute that such limitation is necessarily repealed. Under

these circumstances, the licensee is no longer bound by the points limitation in Section 4.1a.

Very truly yours,

/s/ Ferdinand J. Zeni, Jr.

Ferdinand J. Zeni, Jr.

LEGAL COUNSEL

FJZ/yb

cc: A. Madonia
L. Pusateri

Opinion 96-037

December 3, 1996
FILE NO. 96-037

FINANCIAL INSTITUTIONS:
Federal Preemption of Interest Act Points Limitation

Frank C. Casillas
Director
Illinois Department of Financial Institutions
James R. Thompson Center, 15-700
Chicago, Illinois 60601

Dear Mr. Casillas:

I have your letter wherein you inquire whether section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C. 1735f-7a) (hereinafter referred to as "DIDMCA") preempts section 4.1a of the Illinois Interest Act (815 ILCS 205/4.1a (West 1994)), thereby permitting lenders in Illinois to charge more than three points on residential first mortgage loans. For the reasons hereinafter stated, it is my opinion that DIDMCA does preempt section 4.1a of the Illinois Interest Act, to the extent that section 4.1a would otherwise limit the points which lenders may charge on residential first mortgage loans with interest rates in excess of 8% per annum.

The pertinent portion of section 4.1a of the Illinois Interest Act provides:

"* * *

> Where there is a charge in addition to the stated rate of interest payable directly or indirectly by the borrower and imposed directly or indirectly by the lender as a consideration for the loan, or for or in connection with the loan of money, whether paid or payable by the borrower, the seller, or any other person on behalf of the borrower to the lender or to a

> third party, or for or in connection with the loan of money, other than as hereinabove in this Section provided, whether denominated 'points,' 'service charge,' 'discount,' 'commission,' or otherwise, and without regard to declining balances of principal which would result from any required or optional amortization of the principal of the loan, the rate of interest shall be calculated in the following manner:
>
> The percentage of the principal amount of the loan represented by all of such charges shall first be computed, which in the case of a loan with an interest rate in excess of 8% per annum secured by residential real estate, other than loans described in paragraphs (e) and (f) of Section 4, shall not exceed 3% of such principal amount. Said percentage shall then be divided by the number of years and fractions thereof of the period of the loan according to its stated maturity. The percentage thus obtained shall then be added to the percentage of the stated annual rate of interest.
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> * * * (Emphasis added.)

The provisions limiting charges to 3% of the principal amount on loans bearing interest in excess of 8% that are secured by residential real estate were added to the section by Public Act 78-996, effective July 12, 1974. The quoted paragraphs have not been amended or re-enacted since that date.

Section 501 of DIDMCA (12 U.S.C. 1735f-7a) provides, in pertinent part:

> "(a) Applicability to loan, mortgage, credit sale, or advance; applicability to deposit, account, or obligation. (1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges, which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale or advance which is--

(A) secured by first lien on residential real property, by a first lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation or by a first lien on a residential manufactured home;

(B) made after March 31,1980; and

(C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b))

* * *

(b) Applicability to loan, mortgage, credit sale, or advance made in any State after April 1, 1980. (1) Except as provided in paragraphs (2) and (3), the provisions of subsection (a)(1) shall apply to any loan, mortgage, credit sale, or advance made in any State on or after April 1, 1980.

* * *

(4) At any time after the date of enactment of this Act [enacted March 31, 1980], any State may adopt a provision of law placing limitations on discount points or such other charges on any loan, mortgage, credit sale, or advance described in subsection (a)(1).

* * *"

The express language of the Federal statute preempts the application of any State statute enacted prior to March 31, 1980, with respect to those loans to which the Federal enactment applies. The Federal Appellate Court so held in Currie v. Diamond Mortgage Corp. (7th Cir. 1988), 859 F.2d 1538. Your letter indicates, however, that confusion has arisen regarding whether the preemption extends to non-purchase money loans because of the decision of the Illinois Appellate Court in Fidelity Financial Services, Inc. v. Hicks (1991), 214 Ill. App. 3d 398, appeal denied, 141 Ill. 2d 539 (1991).

In Fidelity Financial Services, Inc. v. Hicks, the appellate court held that the lender had violated section 4.1a of the Illinois Interest Act by imposing a "prepaid finance charge" in excess 13%. With respect to the issue of preemption, the court held that the mortgage in question was not a first lien, and that it was not a purchase-money mortgage; therefore, section 501 of DIDMCA did not preempt the State law. The conclusion that section 501 of DIDMCA did not apply to non-purchase money mortgages was not necessary to the result in the case (since the court had concluded that the loan was not a first lien), and there was no discussion of the Federal authorities on that issue.

Recently, in Gora v. Banc One Financial Services, Inc., No. 95C2542, 1995 U.S. Dist. LEXIS 15232 (N.D. Ill. Oct. 11, 1995), the district court discussed the decision in Fidelity Financial Services, Inc. v. Hicks together with Federal precedent relating to the application of section 501 of DIDMCA to non-purchase money loans. The court discussed Smith v. Fidelity Consumer Discount Co. (3rd Cir. 1990), 898 F.2d 907, in which the appellate court concluded that the plain language of section 501 of DIDMCA applies to all loans secured by a first lien of residential property, whether for purchase money or not. The district court followed that precedent, rejecting the reasoning of Fidelity Financial Services, Inc. v. Hicks.

The Illinois Supreme Court has held that Federal Court decisions supply the rule of law for interpreting Federal statutes. (Boyer v. Atchison, Topeka and Santa Fe Ry. Co. (1967), 38 Ill. 2d 31, cert. denied, 390 U.S. 949, 88 S. Ct. 1038 (1967); Elgin, Joliet and Eastern Ry. Co. v. Industrial Comm'n (1956), 9 Ill. 2d 505, 507.) Further, the Illinois Appellate Court has agreed that Federal decisions determine the preemptive reach of Federal statutes. Golden Bear Family Restaurants v. Murray (1986), 144 Ill. App. 3d 616, 619, appeal denied,112 Ill. 2d 574 (1986); Busch v. Graphic Color Corp. (1996), 169 Ill. App. 2d 325, 335.

In accordance with the pertinent decisions of the Federal Courts, it is my opinion that section 501 of DIDMCA preempts section 4.1a of the Illinois Interest Act, a pre-

existing State statute, with respect to its limitation on the points that may charged in connection with mortgage loans secured by a first lien on residential property, regardless of whether the loans constitute purchase money loans.

Sincerely,

/s/ Jim Ryan

JAMES E. RYAN

Attorney General

http://www.ag.state.il.us/opinions/1996/96-037.html

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